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[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

MDV/167788

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**PRELIMINARY RECITALS**

Pursuant to a petition filed August 06, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Kenosha County Human Service Department in regard to Medical Assistance, a hearing was held on September 29, 2015, at Kenosha, Wisconsin.

The hearing was originally scheduled for September 1, 2015. On August 17, 2015 the petitioner requested that the hearing be rescheduled. The hearing was rescheduled for September 29, 2015.

The issue for determination is whether the agency correctly determined that the petitioner divested \$112,478.82.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Petitioner's Representative:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: Karen Mayer

Kenosha County Human Service Department  
8600 Sheridan Road  
Kenosha, WI 53143

**ADMINISTRATIVE LAW JUDGE:**

Corinne Balter  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The petitioner (CARES # [REDACTED]) is a resident of Kenosha County.
2. The petitioner has a husband who is deceased. She also has one son and one daughter. Both of her children are living. The petitioner and her daughter have spastic paraplegic disease. The petitioner's son is not disabled.
3. In 1999 the petitioner's husband was diagnosed with cancer. The petitioner's family believed that her husband's death was imminent. The petitioner's husband created a trust because he was concerned about caring for his disabled wife and daughter after his death. The petitioner's husband died in 2001.
4. Upon the husband's death the trust converted from a revocable trust to an irrevocable trust. The trustee also changed from the petitioner's husband to three co-trustees. The co-trustees were the petitioner's son, a family friend, and Bank One. The trustees have the sole discretion to distribute the income and principal of the trust. The trust specifically provided:  
  

The trustee shall pay to or apply for the benefit of the surviving spouse and the settlors' daughter, [L.M.N.], and settlor's son, [S.M.N.], from the family trust all sums from net income and in any proportion that may be necessary, in the trustee's discretion, for their health, education (including graduate or technical education), support, and maintenance, in accordance with their accustomed standard of living at the date of the deceased spouse's death, in quarterly or more frequent installments. Any net income not distributed shall be added to principal. It is suggested that the trustee take into consideration that the surviving spouse and settlors' daughter, [L.M.N.], suffer from a hereditary spastic paraplegic disease and are physically disabled and unable to work. If either beneficiary is or becomes eligible for any governmental assistance or disability benefits including SSI benefits, then the trust may withhold or curtail portions or all distributions of income to them in order to not adversely affect their entitlement to such assistance or benefits.
5. The petitioner receives VA benefits. Since approximately 2004 the petitioner's monthly VA benefits have been deposited into the trust account. The petitioner's current monthly VA benefits are \$1,149.
6. On February 25, 2015 \$112,000 was transferred from the trust to the petitioner's son and his wife.
7. On June 4, 2015 \$10,478.82 was transferred from the trust to the petitioner's son.
8. On June 15, 2015 \$2,000 was transferred from the petitioner's checking account to her son.
9. On June 17, 2015 \$12,000 was paid to [REDACTED] for the petitioner's care. The petitioner is currently institutionalized in that facility. This \$12,000 was paid from money that had previously been transferred to the petitioner's son.
10. On June 18, 2015 the petitioner submitted an application for institutional Medicaid requesting a three month back date. On July 20, 2015 the agency sent the petitioner a notice stating that they denied her Medicaid application because there was a divestment. The agency determined the divestment amount by adding the total transfers from the petitioner and family trust to the petitioner's son. This totaled \$124,478.82 (\$112,000 + \$2,000 + \$10,478.82). They then subtracted \$12,000 because \$12,000 of the money transferred was used to pay for the petitioner's care. Thus, the total divestment is \$112,478.82 (\$124,478.82 – \$12,000).
11. On August 10, 2015 the Division of Hearings and Appeals received the petitioner's Request for Fair Hearing.

## DISCUSSION

When an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat. §49.453(2)(a); Wis. Adm. Code §DHS 103.065(4)(a); MA Handbook, Appendix 17.2.1. The divestment must occur during the five-year look back period. Wis. Stat. § 49.453(1)(f)(2m). Divestment does not affect eligibility for standard medical services such as physician care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is the number of days determined by dividing the value of property divested by the average daily nursing home cost to a private pay patient (\$252.95 in 2015). MA Handbook, App. 17.5.2.

In the case of an irrevocable trust that was created prior to the five-year look back period, any funds added to the trust during the look back period are a divestment. MA Handbook, App. 17.13.3. Funds added to an irrevocable trust prior to the five year look back period are also considered a divestment if payments are made from the trust to anyone other than the institutionalized person. Id.

In this case the issue is whether funds transferred from the family's irrevocable trust to the non-disabled son during the five-year look back period are a divestment. \$2,000 was transferred from the petitioner's checking account to her son. The petitioner gave no explanation for this transfer. This transfer was a divestment. The issue of the trust still remains.

First, I note that although the trust was created prior to the five year look back period, the petitioner deposited her monthly VA benefits into the trust during the entire look back period. These deposits likely exceeded \$60,000. The amount of these deposits is a divestment. However, these deposits are not determinative on the outcome of this appeal because the trust also transferred \$122,478.16 to the petitioner's non-institutionalized son.

Payments made from an irrevocable trust during the lookback period to anyone other than an institutionalized person are a divestment if the payments are made within the five year lookback period. MA Handbook, App. 17.13.3. It does not matter whether the funds were deposited into the trust prior to the look back period. Id.

The petitioner argues that the transfers from the trust to the son are distributions, not payments. She fails to describe the difference between a "distribution" and "payment." I see no difference as money was both paid and distributed from the trust to the petitioner's son.

There is no question that \$122,478.82 was transferred from the trust to the petitioner's non-institutionalized son. An additional \$2,000 was transferred from the petitioner's checking account to her non-institutionalized son for a total amount of \$124,478.82. \$12,000 of this \$124,478.82 was used for the petitioner's care. Thus, the total divestment is \$112,478.82 (\$124,478.82 – \$12,000).

The petitioner argues that these transfers, with the exception of the \$2,000 transferred from her checking account, are not a divestment because the money was transferred from the trust, not from her. She reasons that the money in the trust is not her money. First I note that it appears the petitioner's VA benefits deposited into the trust since 2004 were the primary funding source for the trust. However, regardless of whose money was used to create and fund the trust, prior to the transfers of money from the trust to the petitioner's son, the money was available for the petitioner's care. After these transfers that money was no longer available for the petitioner's care.

The petitioner next argues that the purpose of the transfers was not to make the petitioner eligible for institutionalized Medicaid. Therefore, she fits an exception, which states, “a divestment that occurred in the look-back period or any time after does not affect eligibility if the person who divested shows that the divestment was not made with the intent of receiving Medicaid.” MA Handbook, App. 17.4.1.

When considering this argument it is important to consider the entire timeline of events. The petitioner previously applied for Medicaid on September 18, 2014. That application was denied because the assets in the irrevocable trust, were available for the petitioner’s care. The petitioner appealed the agency’s denial, and ALJ Kelly Cochrane issued a written decision on January 12, 2015 concluding that the denial was correct.

Shortly after ALJ Cochrane’s decision, the petitioner’s son decided to use the funds in the trust to purchase a duplex. The idea was that he and his family would live in one half, and his sister in the other half. The agency testified the sister is also a client of theirs and that the sister told them that she has no intention of moving into the duplex. The duplex was purchased for around \$98,000 on or about February 28, 2015. The duplex was titled in the son’s name, not the daughter/sister’s name. The remaining money was to be used to fix up the duplex and make it accessible for the daughter/sister. As of the date of the hearing the sister had no set date of specific plan to move into the bottom unit duplex. There was no testimony that the duplex had been made accessible. The son testified that he rented out the bottom half of the duplex to his mother-in-law. The petitioner then reapplied for institutional Medicaid coverage after the transfers.

Further undermining the petitioner’s argument is the language of the trust itself, which instructs the trustee:

if either [the petitioner or her daughter] becomes eligible for any governmental assistance or disability benefits [], then the trust may withhold or curtail portions or all distributions of income to them in order to not adversely affect their entitlement to such assistance or benefits.”

Although this exact scenario of becoming Medicaid eligible was not envisioned in 1999 when the trust was created, there is no doubt that the family’s intention was for the petitioner and her daughter to receive the maximum amount of governmental benefits available while preserving the trust for other expenses and things, like a family duplex.

As noted by the Department of Health Services in previous final divestment decisions Medicaid was created to provide “basic health coverage to people who do not have sufficient income or resources to provide for themselves.” See final decisions in cases MDV/163634, MDV/165574. The purpose of Medicaid is not to provide health coverage to individuals who have resources available to provide for their care. Id. Here resources were available to provide for the petitioner’s care, the trust then transferred these resources to the petitioner’s son in an attempt to make the resources unavailable for the petitioner’s care. This constitutes a divestment.

### **CONCLUSIONS OF LAW**

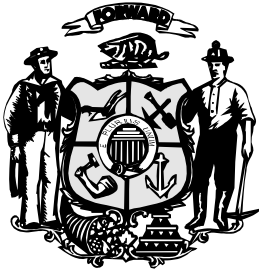
The agency correctly determined that the petitioner divested \$112,478.82.

**THEREFORE, it is**

**ORDERED**

That the petition is dismissed.





**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on November 13, 2015.

Kenosha County Human Service Department  
Division of Health Care Access and Accountability  
Attorney Erik Guttormsen

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